# 92-1630

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No. 93-_____

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1992

LOMAS MORTGAGE USA,
GMAC MORTGAGE CORPORATION,
GOLDOME REALTY CREDIT CORP,

Petitioners,

vs.

DANIEL WIESE and SUE ANN WIESE,
NOEL CERVANTES and ARNEL CERVANTES,
MARK SAUGSTAD and KATHLEEN SAUGSTAD,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Richard Ullstrom
Routh & Crabtree, P.C.
Counsel of Record for Petitioners
P.O. Box 93350
3510 Spenard Road #204
Anchorage, Alaska 99509
(907) 258-3333

## ARGUMENT

In their brief in opposition to the petition for writ of certiorari, respondents Wiese, Cervantes, and Saugstad address themselves to the merits of the Ninth Circuit's decisions in these cases, rather than to why certiorari should or should not be granted. They acknowledge that there is a conflict among the circuits over the issue presented by these cases. Because one side or the other of this conflict is presumably correct, the issue on a petition for writ of certiorari is not which side is right but whether the issue is of sufficient importance for this court to address. This court has already concluded that it is, by granting certiorari in Nobelman v. American Savings Bank, No. 92-641.

In addition to the conflict in authority, these cases raise the issue of whether the Ninth Circuit's decisions are

in conflict with the decision of this Court in Dewsnup v. Timm, ___ U.S. ____, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Respondents argue that Dewsnup was limited to Chapter 7 liquidations, not a "reorganization" under Chapter 13, without explaining how this should impact the interpretation of Section 506(a) and (d). Those provisions apply in all Chapters of the Bankruptcy Code, and must be applied the same way in each Chapter. In re Blue Pacific Car Wash, 150 B.R. 434, 435 (W.D. Wis. 1993).

While pre-Code practice did permit stripdowns in reorganizations, the specific section cited by this Court in Dewsnup as an example of this, former 11 U.S.C. § 616(10), explicitly referred to "satisfaction or modification of liens," language carried over into the new Chapter 11 in § 1123(a)(5)(E). Despite respondents' bald assertion to the

contrary, Chapter 13 contains not one explicit provision allowing a lien to be reduced to the amount of the secured claim. Thus, respondents' effort to distinguish Dewsnup fails, so that this issue also merits the granting of certiorari.

The major new issue raised by respondents is the assertion that the Ninth Circuit's decision can be affirmed on the independent ground that petitioners have additional security, in the form of mortgage insurance, that takes petitioners outside the mortgagee clause of § 1322(b)(2). This argument was made by respondents Wiese to the Ninth Circuit, but effectively rejected by that court when it held that the mortgage insurance could not be taken into account in valuing the mortgagee's secured claim. The mortgage insurance cannot be additional security and yet have no effect on the

amount of the mortgagee's secured claim. Thus, to accept respondents' argument would require reversal of the Ninth Circuit on the mortgage insurance issue. Such a decision should not be reached without consideration of its impact on federal programs to encourage mortgage lending, such as HUD mortgage insurance and VA loan guaranties. Finally, the mortgage insurance is an interest which is contingent in nature, as it will not pay off unless the mortgagee is permitted to foreclose. The emerging consensus of the lower courts is that such contingent interests do not constitute additional security within the meaning of § 1322(b)(2). Matter of Washington, 967 F.2d 173, 174-5 (5th Cir. 1992). Accordingly, there is no alternative basis for affirming the Ninth Circuit, so that it is not appropriate to deny the petition for writ of certiorari.

Petitioners therefore respectfully request that their petition be granted.

DATED this _____ day of _____, 1993.

ROUTH & CRABTREE
ATTORNEYS AT LAW
A Professional Corporation
Attorneys for Petitioners,

By: _____
RICHARD ULLSTROM